ARIZONA SUPREME COURT

NO. _____

STATE OF ARIZONA, Appellee, v. BRAD LEE NELSON, Appellant.	Mohave County Superior Court No. CR2006–0904 **[CAPITAL CASE]**

STATE OF ARIZONA'S PETITION FOR REVIEW

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I. Issues Presented for Review.

1. Did the post-conviction court err by granting Nelson a new penalty-phase trial after holding that defense counsel was ineffective for not requesting a jury instruction under *Simmons v. South Carolina*, 512 U.S. 154 (1994)?

2. Did the post-conviction court err by granting Nelson a new penalty-phase trial after finding that *Lynch v. Arizona* ("*Lynch II*"), 578 U.S. 613 (2016), if applied to Nelson's case, would probably overturn his death sentence under Arizona Rule of Criminal Procedure 32.1(g)?

II. Notice of Related Cases.

The first issue presented here is similar, but in a different posture, to Issue 2 presented in *State v. Bush*, CR-24-0145-PC; Bush's Petition for Review filed June 14, 2024.

The second issue presented here is substantially the same as that presented in *State v. Rose*, CR-23-0315-PC; State's Petition for Review filed December 18, 2023.

III. Material Facts.

In June 2006, Nelson bludgeoned his fourteen-year-old niece to death with a rubber mallet while acting as her care giver. *State v. Nelson*, 229 Ariz. 180, 183, 185, ¶¶ 2, 16 (2012). Nelson attempted to conceal the murder by covering the victim with a blanket, telling housekeeping that his niece was sleeping, and by discarding his shirt and sleeping bag. *Id.* at 183, ¶¶ 3–4; *see also id.* at 183-85, ¶¶ 2–7, 18 (Nelson hid or discarded inculpatory evidence). Upon returning to the

motel room, the victim's younger brother removed the blanket from her and discovered that she was dead. *Id.* at 183, ¶ 5. At trial, the jury convicted Nelson of premediated first-degree murder, found the aggravating circumstance pursuant to A.R.S. § 13–751(F)(9) that Nelson was an adult and the victim was under fifteen, and sentenced Nelson to death. *Id.* at 184, ¶ 8. This Court affirmed the death sentence, finding that the jury did not abuse its discretion. *Id.* at 191, ¶ 56. The United States Supreme Court denied certiorari on October 1, 2012. *Nelson v. Arizona*, 568 U.S. 836 (2012).

Nelson then filed a petition for post-conviction relief in the trial court. R.O.A. 473.[1] Relevant here, Nelson asserted that trial counsel was ineffective for failing to request a parole ineligibility instruction pursuant to *Simmons v. South Carolina*, 512 U.S. 154 (1994). *Simmons* requires that a capital defendant be permitted to inform his jury, when the prosecution argues his future-dangerousness as a reason to impose a death sentence and state law prohibits a parole-eligible sentence, that he cannot receive a parole-eligible sentence. 512 U.S. at 156. In *Lynch v. Arizona*, 578 U.S. 613 (2016), the Supreme Court held that *Simmons* applies in Arizona, contrary to this Court's earlier holdings.

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[1] Citations are to the Electronic Index of Record produced on 6/3/2024.

On October 24, 2018, the post-conviction ("PCR") court denied relief on most of Nelson's claims but, as relevant here, found the *Simmons* claim colorable. *See* 10/24/18 Ruling, at 1–4 (Appendix A). Between 2021 and 2023, the court conducted various evidentiary hearings and ordered supplemental briefing.

On May 17, 2024, the PCR court denied relief on Nelson's ineffective assistance claim related to mitigation but granted relief on the *Simmons* claim under *State v. Anderson*, 547 P.3d 345 (Ariz. 2024), and Arizona Rule of Criminal Procedure 32.1(g), holding that failure to request a *Simmons* instruction "constituted deficient performance" and that "the State cannot prove beyond reasonable doubt that the improper instruction did not affect the verdict in this case." *See* 5/17/24 Ruling, at 22–23 (Appendix B). The State petitions this Court for review of that ruling.

IV. Reasons This Court Should Grant Review.

This Court should grant review to address two errors of law that are likely to reoccur in pending capital cases. *See State ex rel. Mitchell v. Cooper*, 256 Ariz. 1, 7, ¶ 23 (2023) ("We granted review because this case presents recurring issues of statewide importance.").

First, this Court should grant review to address the limits of this Court's decision in *Anderson*, which addressed the "unusual circumstances" of inaccurate advice concerning parole availability in the plea-bargaining context.

Second, this Court should grant review to confirm that, before a defendant may obtain relief on a *Simmons* claim under Rule 32.1(g), he must demonstrate that a parole-ineligibility instruction would probably overturn his sentence. *See* Ariz. R. Crim. P. 32.1(g) ("there has been a significant change in the law that, is applicable to the defendant's case, would probably overturn the defendant's judgement or sentence."). Because Nelson cannot meet his burden to show that a *Simmons* instruction would probably overturn his sentence, this Court should vacate the PCR court's grant of relief.

V. Issue 1: The PCR court misapplied *Strickland*.

In its decision granting relief, the PCR court held that trial counsel rendered deficient performance under *Anderson* and that Nelson was prejudiced because there was a reasonable probability that the jury would have sentenced him to life had they been instructed that Nelson was ineligible for parole. *See* Appendix B, at 22–23. But because the PCR court extended *Anderson* beyond its narrow terms and misapplied *Strickland*, this Court's review is warranted.

A. The PCR court's decision conflicts with the prior holdings of this Court and the Arizona District Court on effective assistance of counsel.

First, the PCR court's analysis in granting relief on Nelson's ineffective assistance of counsel claim departs from how this Court and others have addressed similar claims.

In *State v. Cromwell*, the PCR court rejected a nearly identical IAC claim where "counsel did not raise the *Simmons* error at trial or otherwise request a parole-eligibility instruction." Appendix C at 23. The court found no prejudice and quoted this Court's holding in *Bush* that "*Simmons* relief is foreclosed by the defendant's failure to request a parole ineligibility instruction at trial." *Id.* (quoting *State v. Bush*, 244 Ariz. 575 593, ¶ 74 (2018)). This Court affirmed in an unpublished order, granting review in part and holding: "The record does not show that trial and appellate counsel violated Cromwell's Sixth Amendment right to effective assistance of counsel by failing to invoke *Simmons v. South Carolina*, 512 U.S. 154 (1994)." Appendix D at 1. This Court held the same in *State v. Carlson*, CR-22-0157-PC (Oct. 17, 2023). *See* Appendix F.

In *Ellison v. Thornell*, the defendant argued that under *Lynch II*, "counsel performed ineffectively by failing to inform the jury that he would not have been eligible for parole if sentenced to life." --- F.Supp.3d ---, 2024 WL 942283, at *101 (D. Ariz. Mar. 5, 2024). The district court rejected this claim, holding that, at the time of the trial, Arizona Supreme Court law did not require a *Simmons* instruction. *Id.* (citing *State v. Cruz* ("*Cruz I*"), 218 Ariz. 149 (2008) and *State v. Lynch* ("*Lynch I*"), 238 Ariz. 84 (2015)). The court found that:

> Given that backdrop, reasonable counsel could have concluded that Ellison was in fact parole-eligible (and, therefore, there were no grounds for an objection). Indeed, in a series of decisions issued between 2008 and 2015, the Arizona Supreme Court reached that very

> conclusion, which establishes that reasonable counsel in 2004 could have reached the same conclusion, too.

Id.

The district court then cited several federal cases for the proposition that "conduct must be evaluated for purposes of the performance standard of *Strickland* as of the time of counsel's conduct." *Id.* (collecting cases). The district court also noted that "[f]or the same reason, there is no support for the proposition that the trial court would have granted an objection to the instruction." *Id.* The district court found the "claim of trial-counsel ineffectiveness is without merit." *Id.*

Other courts in Arizona have reached similar conclusions regarding *Simmons* and *Strickland*. *See Nordstrom v. Thornell*, CV-20-00248-TUC-RCC, 2024 WL 1092517, at *6 (D. Ariz. Mar. 13, 2024) (finding IAC claim for failing to request a *Simmons* instruction meritless under *Bush*); *Cota v. Thornell*, CV-16-03356-PHX-DJH, 2023 WL 4595176, at *35 (D. Ariz. July 18, 2023) ("Even if counsel had failed to request such an instruction, that failure would not be ineffective assistance because, under then-current Arizona law and its incorrect interpretation of *Simmons*, Cota was theoretically entitled to some form of release"); *State v. Bush*, CR-2009-2300-003, at 15 (Pima Sup. Ct. April 12, 2024) (Pet. for Review filed 6/14/24) (Appendix E) ("Defendant's suggestion that trial counsel should have been able to predict a change in the law 5 years later is not persuasive").

More fundamentally, under *Strickland v. Washington*, 466 U.S. 668 (1984), courts must assess the reasonableness of counsels' actions from their perspective at the time. *Maryland v. Kulbicki*, 577 U.S. 1, 4 (2015) (citing *Strickland*, 466 U.S. at 690). This is to "eliminate the distorting effects of hindsight." *Strickland*, 466 U.S. at 689. "Counsel's failure to predict future changes in the law is not ineffective assistance because 'clairvoyance' is not a required attribute of effective representation." *State v. Macias*, 249 Ariz. 335, 341, ¶ 18 (App. 2020) (quoting *State v. Febles*, 210 Ariz. 589, 597, ¶ 24 (App. 2005)). "Given that the reasonableness of counsel's conduct must be evaluated based on the time it occurred, courts have articulated a rule that ineffective assistance of counsel claims generally cannot be predicated on counsel's failure to anticipate changes in the law." *United States v. Juliano*, 12 F.4th 937, 940 (9th Cir. 2021). *See also Sophanthavong v. Palmateer*, 378 F.3d 859, 870 (9th Cir. 2004) ("*Strickland* does not mandate prescience ...."); *Commonwealth v. Mason*, 130 A.3d 601, 652 (Pa. 2015) (rejecting ineffectiveness claim for failing to request a *Simmons* instruction; counsel not required to predict future change in law).

B. The PCR court improperly relied on *Anderson* to find trial counsel performed deficiently.

The PCR court extended the narrow holding in *Anderson* to the *Simmons* context. In doing so, it held that any failure to request a *Simmons* instruction

constitutes deficient performance. But *Anderson* did not purport to reach so far, and this Court should not countenance its application in this manner.

In *Anderson*, this Court considered the "dispositive issue" of whether an "attorney's erroneous advice excuse[d] both Anderson's delay and his failure to raise that erroneous advice as an issue in [a] prior" petition for post-conviction relief. 547 P.3d at 349, ¶ 14. A jury convicted Anderson of conspiracy to commit first-degree murder in 2000, and the trial court imposed a sentence "of life without possibility of release until the service of at least 25 years." *Id.* at 348, ¶ 4. Anderson subsequently filed petitions for post-conviction relief in 2000 and 2003 that raised claims of ineffective assistance of counsel, but they were denied and dismissed. *Id.* at ¶ 5.

In 2022, Anderson filed a third petition for post-conviction relief, alleging "that while he was considering whether to accept a plea agreement stipulating to a term of eighteen to twenty-two years in prison, his trial counsel advised him that if he did not accept the plea agreement and was found guilty at trial, parole would be available after he served twenty-five years." *Id.* at ¶ 6. Anderson further "claimed that he only recently learned he was not parole eligible when he attempted to enroll in an educational program through the Arizona Department of Corrections, Rehabilitation, and Reentry ("ADCRR")." *Id.* "And ADCRR policies as recently

as 2021 were unclear about whether inmates like Anderson who were sentenced to other than natural life sentences were eligible for parole." *Id.* at 350, ¶ 17.

Addressing timeliness and preclusion, this Court held that Anderson had adequately explained his failure to raise the claim in a prior petition for post-conviction relief and, therefore, the petition was neither untimely, nor did it raise a precluded claim. *Id.* at ¶¶ 15–25. This Court's ruling was based on the "unusual" circumstances Anderson faced which made his 2022 petition "the first time he could have reasonably raised the issue of erroneous advice about the availability of parole." *Id.* at 349–51, ¶¶ 25–26. This Court made clear that "[w]e do not, however, hold Rule 32.1(a)'s exception to the preclusion rule applies broadly to IAC claims based on erroneous advice surrounding plea agreements" and emphasized that "Anderson's claim represents an extremely rare set of circumstances in the context of the pervasive confusion about parole and the extraordinary remedies [the court] and the legislature fashioned to deal with it." *Id.* at 351–52, ¶ 26 (emphasis added).

Addressing colorability, this Court noted that "[e]rroneous legal advice during plea negotiations can constitute deficient performance." *Id.* at 352, ¶ 28. "The point is not whether counsel erred but whether counsel's errors were so deficient as to provide ineffective assistance." *Id.* at ¶ 29. Anderson's attorney gave him incorrect legal advice "based on his failure to realize parole had been

abolished for the charged offense" which seriously affected "Anderson's ability to intelligently consider the alleged plea offer." *Id.* at ¶ 31. This Court ultimately held that the "attorney's performance was deficient under *Strickland* because his error constituted incorrect advice on a significant issue relating to Anderson's potential sentence if convicted." *Id.* (emphasis added).

First, this Court's recent observation concerning the "pervasive confusion" surrounding parole, *see Anderson*, 547 P.3d at 350, ¶ 19, was not omnipresent in the *Simmons* context as numerous capital defense attorneys made *Simmons* requests prior to the decision in *Lynch II*. *See, e.g.*, Appendix G; Nelson's Supplemental *Simmons* Memorandum *filed* 11/13/2023, at 16 (noting 12 cases between 2008 and 2016 raising *Simmons*); *cf.* PCR Ex. 124, at ¶ 3 (defense expert asserting "Competent capital defense attorneys have been arguing this point since 1993."). This distinction alone should have compelled the PCR court to evaluate the reasonableness of counsel's actions from their perspective at the time of trial and under the prevailing professional norms. *See Kulbicki*, 577 U.S. 1, 4. And because at the time of Nelson's trial this Court had held a *Simmons* instruction unnecessary, *see Cruz I*, 218 Ariz. 149, trial counsel's conduct fell within the prevailing professional norms. *See State v. Miller*, 251 Ariz. 99, 103, ¶ 12 (2021) (counsel not unreasonable when erroneous "RAJI was not called into question until

well after Miller's trial and appeal" and was "not an obvious, grievous error"). By holding otherwise, the PCR court erred.

Additionally, while this case and the one in *Anderson* both involve the application of the parole statute, this case does not involve legal advice on a plea agreement. "When the consequences of a plea are clear…'the duty to give correct advice is equally clear' and counsel must inform their client of those consequences." *State v. Nunez-Diaz*, 247 Ariz. 1, 4, ¶ 11 (2019) (quoting *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010)). This makes eminent sense, because a criminal defendant relies almost entirely on the advice of counsel in making a knowing and informed decision on whether to plead guilty. *See State v. Donald*, 198 Ariz. 406, 413, ¶ 16 (App. 2000) ("To establish deficient performance during plea negotiations, a petitioner must prove that the lawyer either (1) gave erroneous advice or (2) failed to give information necessary to allow the petitioner to make an informed decision whether to accept the plea.")

In one context, the advice of counsel largely determines how a defendant will exercise a constitutional right, i.e. whether the defendant will plead guilty or not. And as this Court held in *Anderson*, counsel's ignorance of the parole statute constituted a serious error because it directly affected Anderson's ability to intelligently consider a plea offer. 547 P.3d at 352, ¶ 31. But in this context, counsel's alleged ignorance of the parole statute had no impact on Nelson's ability

to exercise a constitutional right and would not amount to "serious error" as described in *Anderson*. And where alleged ignorance of the law does not constitute "serious error," a reviewing court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S. at 690.

Criminal defendants do not rely on the *advice* of counsel in the realm of trial strategy, and requests for specific jury instructions are squarely in the strategic domain. *State v. Pandeli*, 242 Ariz. 175, 189, ¶¶ 56–57 (2017); *see also State v. Lee*, 142 Ariz. 210, 215 (1984) (although "certain basic decisions have come to belong to an accused," such as "whether to waive jury trial," "the power to decide questions of trial strategy and tactics rests with counsel"). Nelson's counsel did not request a *Simmons* instruction, a necessary predicate for *Simmons* to apply at all. *See Bush*, 244 Ariz. at 591, ¶ 67; *see also Commonwealth v. Spotz*, 759 A.2d 1280, 1291 n.14 (Pa. 2000) ("The trial court's obligation to issue a *Simmons* charge is triggered only upon the existence of twin requirements, i.e., future dangerousness being placed at issue, and a defense request. These are substantive requirements, not procedural ones."). But the failure to request a *Simmons* instruction alone cannot constitute deficient performance in the same manner that this Court found ignorance of the parole statute did in *Anderson*.

Trial counsel made a deliberate strategic choice to limit the mitigation evidence to the abuse Nelson suffered as a child, his mental health as a child, and other aspects of his childhood. R.O.A. 230 at 2; R.T. 12/22/09, at 7, 10; PCR Ex. 52 at 111 (Attorney Belanger: "we had tailored it so that we didn't talk about the facts of the crime…we didn't do anything to open that door"); PCR Ex. 51, at 20 (Attorney Belanger: "In mitigation [we] didn't get into his adult life at all."). *See also Nelson*, 229 Ariz. at 191, ¶ 53 ("Nelson presented no evidence of his life between 1986 and 2006"). By doing this, trial counsel limited the State's rebuttal evidence and effectively prevented the State from presenting rebuttal witnesses of its own. *See* PCR Ex. 51, at 20; R.T. 12/4/09, at 63–76; *see also Harrington v. Richter*, 562 U.S. 86, 111 (2011) ("it is difficult to establish ineffective assistance when counsel's overall performance indicates active and capable advocacy"). Additionally, the State's cross-examinations of Nelson's witnesses were limited to what the witnesses observed. R.T. 12/2/09, at 131–48 (State's cross of Nelson's childhood social worker); R.T. 12/3/09, at 47–60 (State's cross of Nelson's childhood psychologist); R.T. 12/4/09, at 52–63 (State's cross of clinical psychologist); *see* PCR Ex. 51, at 11 (Attorney Belanger saying State did not put on rebuttal evidence in the penalty phase and was limited to the sole aggravator).

Trial counsel's strategy during the penalty phase was therefore clear: prevent the State from presenting damaging rebuttal evidence. *See Darden v. Wainwright*,

477 U.S. 168, 186 (1986). Trial counsel secured numerous favorable rulings from the trial court in service of this strategy. *See, e.g.*, R.T. 12/1/09, at 25; R.T. 12/4/09, at 85 (instructing that "any doubt as to whether death is the appropriate sentence, that doubt must be resolved in favor of a life sentence"). But if trial counsel requested and received a *Simmons* instruction, even where Nelson's future dangerousness was questionably at issue, the State would have been at liberty to fully argue that Nelson presented a future danger not deserving of leniency based on his character, history, propensities, and record. As explained below, the State had ample evidence of Nelson's future dangerousness that the jury never heard. But instead of determining whether trial counsel could have had a reasonable strategic choice for not requesting a *Simmons* instruction, the PCR court held that trial counsel was *per se* deficient under *Anderson*. This was error and warrants this Court's intervention.

C. The PCR court failed to consider all of the evidence when finding *Strickland* prejudice.

In determining whether trial counsel's performance prejudiced a defendant, a "reviewing court must consider all the evidence—the good and the bad." *Wong v. Belmontes*, 558 U.S. 15, 26 (2009). The PCR court failed to account for what evidence would have been placed before the jury had they been instructed on parole ineligibility.

Although the PCR court noted the "significant and impactful mitigation" presented, the court failed to consider the significant evidence of future dangerousness that was not presented to the jury. Appendix B at 22; *see Simmons*, 512 U.S. at 175 (O'Connor, J., concurring) ("the defendant's future dangerousness is a consideration on which the State may rely in seeking the death penalty"); *California v. Ramos*, 463 U.S. 992, 1003, n.17 (1983) (explaining that it is proper for a sentencing jury in a capital case to consider "the defendant's potential for reform and whether his probable future behavior counsels against the desirability of his release into society"). The PCR court found future dangerousness at issue because in the "State's closing argument the prosecutor suggested the Defendant's own sexual abuse might 'explain his unnatural desire for his 14-year-old niece' [suggesting] the Defendant had an unnatural propensity for sexual violence." Appendix B at 23.[2] But had defense counsel requested and received a *Simmons* instruction, future dangerousness would have been squarely in play and the State could have offered significant evidence of Nelson's future dangerousness, including:

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[2] Although the State does not separately challenge in this petition the PCR court's finding that future dangerousness was at issue, the State argued to the PCR court that future dangerousness was not at issue because the state did not present such evidence or argue it specifically in closing. R.O.A. 718 at 13–14.

- Nelson's assaultive behavior and other crimes. R.T. 7/21/21, at 55–56; R.T 7/22/21, at 111, 114; PCR Ex. 36, at 224–80, 395–462, 478–84 (court records and police reports for Nelson's crimes in New Mexico, Massachusetts, Florida, and Las Vegas); R.T. 5/21/21, at 232–34, 238–55; PCR Ex. 174, at 148;
- Nelson's diagnosis of antisocial personality traits. PCR Ex. 25, at 35–36; *see People v. Winbush*, 387 P.3d 1187, 1243 (Cal. 2017) (state could cross defense expert on antisocial personality disorder and future dangerousness); *Atwood v. Ryan*, 870 F.3d 1033, 1063 (9th Cir. 2017) ("As we have noted, evidence of [ASPD] may be highly damaging.") (collecting cases);
- Nelson's "sexual boundary issues." PCR Pet. Appx. 19, at 4–6 & ¶ 41;
- Nelson's conviction for assaulting his disabled wife in 1994, where he was sentenced to a term in jail, and failed to follow jail rules by making a weapon. R.T. 5/21/21, at 238–55; PCR Ex. 36, at 224–63; *see Kelly v. South Carolina*, 534 U.S. 246, 253 (2002) (discussing possession of shank as evidence of future dangerousness);
- Nelson's 1994 molestation of a 14-year-old girl and explanation that 14-year-old girls are "his type." R.T. 5/21/21, at 240–43; PCR Ex. 56, at 12;
- Nelson's assault on his ex-girlfriend in Massachusetts and high-speed chase with police which resulted in injuries and attacking the arresting officer. R.T. 5/21/21, at 238–55; PCR Ex. 36, at 395–435; *see Kelly*, 534 U.S. at 253 (discussing escape attempt as evidence of future dangerousness).

Most damaging, the State could have presented evidence from Nelson's half-sister Corrine that Nelson had previously raped her twice. PCR Response Ex. P (Kingman Police Dept. Report), at 34 (Corrine recounting two previous incidents where Nelson raped her twice). The first incident occurred when Corrine was on medications and away from her husband for about a year. *Id.* Amber and Wade

observed the rape and informed Corrine what occurred. *Id.* The second rape happened when Corrine was asleep and woke to find Nelson on her. *Id.* Corrine asked Nelson to stop and Nelson reacted by becoming angry and violent, nearly breaking her jaw. *Id.*

In addition to the multiple rapes of his sister, the State could have presented evidence that Nelson had raped his victim as well prior to the murder. The victim's friend, Kayla, recounted how the victim was afraid of Nelson and how the victim reported that Nelson previously raped her and that she feared Nelson intended to kill her. PCR Response Ex. P (Kingman Police Dept. Report), at 26. Kayla, fourteen years old at the time, also described how, on a trip to Laughlin, Nelson flirted with her. *Id.* Further still, Amber reported to her friends Kayla and Corine that Nelson raped her prior to the murder. *Id.* at 27.

Therefore, the State's full presentation of future dangerousness would have shown both that Nelson was violent and possessed deviant and dangerous sexual interests, demonstrating that Nelson was undeserving of leniency. *See State v. Sanders*, 245 Ariz. 113, 122, ¶ 18 (2018) ("placing future dangerousness at issue invites the jury to assess whether the defendant's propensity for violence is so great that imposing death is the only means to protect society"); *cf. Darden*, 477 U.S. at 186 (considering State's potential rebuttal when evaluating IAC prejudice claim).

Had the PCR court considered the totality of the evidence, both the good and the bad as *Strickland* dictates, it would have been forced to conclude that there was no reasonable probability of a different outcome. The PCR court's failure to consider the impact of the State's rebuttal to a parole ineligibility instruction constitutes error and must be corrected.

VI. Issue 2: The PCR court applied the wrong burden under Arizona Rule of Criminal Procedure 32.1(g).

Rule 32.1(g) permits post-conviction relief if "there has been a significant change in the law that, if applicable to defendant's case, would probably overturn the defendant's judgment or sentence." Ariz. R. Crim. P. 32.1(g). To obtain relief under this provision, Nelson must establish that *Lynch II*: (1) is a significant change in the law; (2) is applicable to his case; and (3) would probably overturn his sentence. *See State v. Carriger*, 143 Ariz. 142, 146 (1984) ("It is the petitioner's burden to assert grounds that bring him within the provisions of the Rule in order to obtain relief."); *State v. Evans*, 252 Ariz. 590, 595, ¶ 7 (App. 2022) ("A defendant must strictly comply with the rules to be eligible for [post-conviction relief].").

Initially, the PCR court erred by failing to consider this Court's decisions addressing when a *Simmons* instruction is not requested. As found by this Court and other courts, a *Simmons* instruction is not required and is waivable. *See State v. Bush*, 244 Ariz. 575, 592, ¶ 74 (2018); *O'Dell v. Netherland*, 521 U.S. 151, 167

(1997) (a *Simmons* instruction is not an affirmative right, it is a "narrow right of rebuttal"); *Townes v. Murray*, 68 F.3d 840, 850 (4th Cir. 1995) (noting *Simmons* does not require "the sentencing jury be informed that the defendant is parole ineligible"); *Morris v. Thornell*, CV-17-00926-PHX-DGC, 2023 WL 4237334, at *6 (D. Ariz. June 28, 2023) ("Morris points the Court to no controlling authority that recognizes a *Simmons* due process claim as anything more than a waivable right of 'opportunity' or 'rebuttal.'").

In *Bush*, this Court adopted a "narrow interpretation of *Simmons*," reasoning that "the due process right under *Simmons* merely affords a parole-ineligible capital defendant the right to 'rebut the State's case' (if future dangerousness is at issue) by informing the jury that 'he will never be released from prison' if sentenced to life." 244 Ariz. at 592–93, ¶¶ 73–74 (quoting *Simmons*, 512 U.S. at 177 (O'Connor, J., concurring)). This Court noted that relief under *Simmons* "is foreclosed by [the defendant's] failure to request a parole ineligibility instruction at trial." *Id.* at 593, ¶ 74 (quoting *Campbell v. Polk*, 447 F.3d 270, 289 (4th Cir. 2006)). This Court found that despite defense counsel's brief and "vaguely voiced disagreement before jury selection over whether jurors should 'be advised as to the possibility of release,'" no fundamental *Simmons* error occurred because Bush failed to show "that he was deprived of the right to inform the jury of his parole ineligibility." 244 Ariz. at 590, 592, 593, ¶¶ 64, 70, 75 ("Unlike in the

aforementioned cases [in which courts found reversible *Simmons* error], the trial court neither refused to instruct, nor prevented Bush from informing, the jury regarding his parole ineligibility."). This Court has reaffirmed that holding. *See State v. Riley*, 248 Ariz. 154, 195, ¶ 169 (2020) ("More importantly, at no point did Riley or his counsel offer parole ineligibility instructions orally or in writing.").

Setting aside the impact of *Bush*, the predominant issue here hinges on the application of the third prong of 32.1(g).[3] But in holding that *Lynch II* would probably overturn Nelson's sentence, the PCR court improperly relieved Nelson of his burden under Rule 32.1(g) to prove that application of *Lynch II*/*Simmons* "would probably overturn [his] sentence." First, the court erred by holding that "it is unclear what review is appropriate to apply in the context of *Simmons* error." Appendix B, at 22. To the contrary, Rule 32.1(g) expressly places the burden on a defendant to show that a retroactive change in the law would "probably overturn [his] sentence." Ariz. R. Crim. P. 32.1(g). This Court has confirmed that burden, explaining that "[i]n order to be entitled to resentencing, [defendants] must also establish that [the change in law] 'if determined to apply ... would probably overturn' their sentences.'" *State v. Valencia*, 241 Ariz. 206, 209, ¶ 17 (2016),

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[3] After the Supreme Court's decision in *Cruz III*, the State has not and does not contest that *Lynch II* represents a significant change in the law. Moreover, the State does not contest here that *Lynch II* applies to Nelson's case.

overruled on other grounds by Cooper, 256 Ariz. at 10, ¶ 47 (quoting Ariz. R. Crim. P. 32.1(g)). The PCR court erred by failing to hold Nelson to his burden to show that the change in the law would probably have overturned his sentence.

Further, the court erred by shifting the burden to the State to show that any *Simmons* error was harmless beyond a reasonable doubt. While Rule 32.13(c) generally states that the State has the burden of proving harmless any constitutional violation proven by the defendant, Rule 32.1(g) specifically places the burden on the defendant to show that a change in the law would "probably overturn the defendant's judgment or sentence." In *Valencia*, this Court expressly placed the burden on the defendants to establish by a preponderance of the evidence (or "probably") that they would have received a different sentence absent the constitutional error. 241 Ariz. at 210, ¶ 18. "Only if they meet this burden will they establish that their natural life sentences are unconstitutional, thus entitling them to resentencing." *Id*. (emphasis added).

After the conclusion of the direct appeal, a conviction is final and is entitled to a presumption of constitutionally that the defendant must overcome. *See State v. Towery*, 204 Ariz. 386, 389-90 (2003) (criminal case is final when conviction rendered, available appeal exhausted, and petition of certiorari elapsed or denied); *State v. McCann*, 200 Ariz. 27, 28, ¶ 6 (2001) (final judgements are presumed to be constitutionally obtained); *Canion v. Cole*, 210 Ariz. 598, 600, ¶ 13 (2005) (same).

In shifting the burden to the State to show "beyond a reasonable doubt that the improper instruction" was harmless, the PCR court improperly considered this issue as if it were presented on direct appeal rather than under Rule 32.1(g). Appendix B, at 23. This error is demonstrated by the fact that the court inappropriately relied on this Court's direct appeal opinions to conclude that, on post-conviction review, "there has been a significant change in the law and would require the State to prove the error harmless beyond a reasonable doubt." *Id*. (citing *State v. Hulsey*, 243 Ariz. 367 (2018); *State v. Escalante-Orozco*, 241 Ariz. 254 (2017)). This Court's harmless error review of *Simmons* claims on direct appeal is not relevant to a consideration under Rule 32.1(g) of whether a significant change in the law would probably overturn a defendant's sentence. *See Carriger*, 143 Ariz. at 146; *Evans*, 252 Ariz. at 595, ¶ 7. *See also Bush*, 244 Ariz. at 591, ¶ 67 (*Simmons* error is not structural).

By using the wrong burden, the PCR court improperly relied on speculation to grant Nelson relief under 32.1(g). *See Speiser v. Randall*, 357 U.S. 513, 525 (1958) ("In all kinds of litigation it is plain that where the burden of proof lies may be decisive of the outcome."). The PCR court found that "it is very difficult to know, 'what role the possibility of release played in the jurors' minds as they decided the propriety of the death penalty.'" Appendix B at 23 (quoting *Escalante-Orozco*, 241 Ariz. at 284, ¶ 126). But speculation alone is not enough to

demonstrate that a change in the law would probably overturn a petitioner's sentence. *See State v. Broughton*, 156 Ariz. 394, 397–98 (1988) (prejudice requires a showing of more than mere speculation); *State v. Allen*, 253 Ariz. 306, 334, ¶ 62 (2022) (capital defendant cannot rely on "assumptions about what the jury might have considered in its deliberations" to prove prejudice).

The PCR court's reliance on this Court's direct-appeal decisions conducting harmless-error review does not justify ignoring the requirements of Rule 32.1(g). Rule 32.1(g) imposes a burden on the defendant to demonstrate that the application of a significant change in the law would probably overturn his sentence, and it leaves no room for shifting the burden to the State to demonstrate harmless error. *See Valencia*, 241 Ariz. at 209–10, ¶ 17 ("In order to be entitled to resentencing, [defendants] must also establish that [the change in law] would probably overturn their sentences." (internal quotation marks omitted)). Applying the correct standard, and considering the record as a whole, this Court should find that Nelson failed to establish that his sentence probably would have been different had the trial court given a *Simmons* instruction.

VII. Conclusion.

Because the PCR court misapplied *Strickland* and Rule 32.1(g), this Court should grant review and relief.

RESPECTFULLY SUBMITTED this 12 day of July 2024.

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LIST OF APPENDICES

A: Colorable Claim Minute Entry 10/24/18

B: Court Order Granting Relief 05/17/24

C: Cromwell Minute Entry Dismissing PCR 09/09/20

D: Arizona Supreme Court Order Denying Petition for Review 04/04/23

E: Bush PCR Order 04/12/24

F: Minute Letter ASC - Carlson, CR-22-0157-PC, (Ariz. 10-17-2023)

G: Selection of Preserved *Simmons* Claims